

- A **JAMAL NASIR ZULKIPLI & ANOR**
- v.
- B **NG SZE TIAN & ANOR**
- B HIGH COURT SABAH & SARAWAK, KUCHING  
RAVINTHRAN PARAMAGURU JC  
[CIVIL APPEAL NO: 12B-10-2011]  
31 JANUARY 2012
- C **DAMAGES:** *Personal Injury or Death - Award - Decision of Sessions Court - Appeal against - General damages and special damages - Whether award of RM170,000 and RM180,000 for paraplegia sufficient - Whether separate award for bladder impairment and erectile dysfunction should be awarded - Nursing care - Whether assessment based on cost of engaging domestic help - Whether claim for renovation to facilitate use of*
- D *wheelchair should be allowed*
- E **TORT:** *Damages - Assessment - Appellants sustained paraplegic injuries and wheelchair bound for life - Nursing care - Whether based on cost of engaging domestic help - Whether claim for renovation to facilitate use of wheelchair should be allowed*
- F The first appellant, a motorcycle rider and the second appellant, his pillion rider, were involved in a motor vehicle accident involving the car driven by the first respondent. Dissatisfied with the damages awarded by the Sessions Court, both the appellants appealed against the said amount. The Sessions Court Judge awarded a sum of RM170,000 and RM180,000 to the appellants respectively but declined to make a separate award for loss of sexual function. The Sessions Court Judge opined that bladder
- G incontinence and erectile dysfunction were interrelated with the waist down paralysis. For the cost of pre-trial nursing care, the first appellant was awarded RM600 per month. The first appellant's wife who was previously earning RM400 a month had stopped working to look after the first appellant. Further, for the
- H costs of future nursing care, the Sessions Court Judge had awarded RM850 to the first appellant and RM950 to the second appellant. The appellants also testified that they had renovated their houses to accommodate the use of a wheelchair. However, the Sessions Court Judge disallowed the claim for the sole reason
- I that the renovation receipts were not produced. The issues raised

in this appeal, *inter alia* were: (i) whether there was a need for a separate award for bladder impairment and erectile dysfunction; (ii) whether the award of general damages of RM170,000 and RM180,000 awarded to the appellants for the injuries of paraplegia from waist down should be varied; (iii) whether the award of RM600 for costs for nursing care for the first appellant was insufficient; and (iv) whether the claim for renovation to the appellants' house to facilitate the use of a wheelchair should be allowed.

**Held (allowing appeal in part; varying quantum):**

- (1) The award for paraplegia awarded by the Sessions Court Judge could not be said to be out of line with recent comparables. The award was not inconsistent with the recent trends that it could not be considered as wholly erroneous. The appellants were not bed ridden and could move about in wheelchairs. Therefore, the award of RM170,000 and RM180,000 for paraplegia was affirmed. (paras 5 & 6)
- (2) The appellants had lost their sexual function in the prime of their life. Therefore, the appellants should be compensated for their losses. Since a reasonably large award had already been granted to the appellants for being rendered paraplegic, a separate award of RM30,000 was granted for loss of sexual function. (para 8)
- (3) The Sessions Court Judge erred in awarding only RM850 and RM950 per month respectively to the first and second appellants. The evidence from the appellants was that they still needed assistance to move about. The first appellant was assisted by his wife and the second appellant was assisted by his mother and siblings. It was possible that they may not be around in future to continue looking after the appellants. Therefore, the appellants should be awarded compensation to assist them for the rest of their natural lives. Thus, a sum of RM1,500 and RM1,600 per month as the costs of hiring a domestic maid was awarded. (para 12)
- (4) As the oral evidence of the appellants and the contractors were not addressed, the Sessions Court Judge fell into error when he failed to give sufficient reasons for disallowing the

- A claim for renovation. The renovation was plausible as the appellants were wheelchair bound for life. Unless the amount of RM8,000 and RM10,000 respectively claimed by the appellants were demonstrably challenged, the Sessions Court should have allowed this claim. (para 13)
- B **Case(s) referred to:**  
*Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127 HC (**refd**)  
*Cheng Siak Hor & Anor v. Rozali Ahmad* [2002] 4 CLJ 223 HC (**refd**)  
*Dass Darmalingam lwn. Mohd Fauzi Mohd Salleh & Satu Lagi* [2009] 1 LNS 1581 HC (**refd**)
- C *Izhar Ishak v. Cheah Per Nam & Anor* [2009] 1 PIR 26 (**refd**)  
*M Kumaresan Muniandy v. Gan Yew Peng* [2011] 2 PIR 35 (**refd**)  
*Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 SC (**refd**)  
*Mohd Amiruddin Kamurudin & Another v. Fazilah Abdul & Another* [2008] 1 PIR 35 (**refd**)
- D *Mohd Redzal Hasim v. Wong Kwai Chuen* [2008] 1 PIR 7 (**refd**)  
*Syarizan Sudirman & 2 Ors v. Abdul Rahman Bukit & Another* [2010] 2 PIR 51 (**dist**)  
*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC (**refd**)
- E *Thrimalai Palamiappan & Anor v. Mohd Masry Tukimin* [1986] 1 CLJ 347; [1986] CLJ (Rep) 756 HC (**dist**)  
*Zulsafari Ab Ghani & Anor v. Shahril Idris* [2002] 3 CLJ 187 HC (**refd**)
- F *For the appellants - Sarbjit Singh Khaira; M/s Khaira & Co Advocates*  
*For the respondents - Candida Entri; M/s Teo Sehom, Tan & Madhi Advocates*  
[Appeal from Sessions Court, Kuching; Summons No: 53-103-2010-I]  
*Reported by Sandra Gabriel*

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## JUDGMENT

**Ravinthran Paramaguru JC:**

H **Introduction**

[1] This is an appeal from the decision of the Sessions Court in a personal injury case. The appeal is in respect of quantum only.

### Brief Facts

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[2] The appellants were involved in a motor vehicle accident on 5 May 2007. The first appellant was the rider of a motorcycle whereas the second appellant was his pillion rider. They collided

with a car driven by the first defendant. Both appellants suffered serious injuries that rendered them paraplegic from waist downwards. The serious injuries that the appellants suffered are as follows:

*First Appellant*

- (a) Bladder impairment and erectile dysfunction;
- (b) Fracture and dislocation at level T12/L1; and
- (c) Paraplegic from waist down.

*Second Appellant*

- (a) Fracture dislocation of L2-L3;
- (b) Urinary incontinence;
- (c) Complete paraplegia;
- (d) Bladder impairment; and
- (e) Erectile dysfunction.

**Grounds Of Appeal**

[3] The learned Sessions Court Judge found the first defendant wholly liable for the accident. He awarded the first appellant RM249,000 in general damages and RM634,099 in special damages. The second appellant was awarded RM194,000 in general damages and RM675,193 in special damages. The respondents have not appealed the decision of the Sessions Court Judge. However, the appellants have appealed part of the decision of Sessions Court in respect of:

- (a) the refusal of the Sessions Court Judge to make a separate award for bladder impairment and erectile dysfunction;
- (b) the general damages of RM170,000 and RM180,000 awarded to the first and second appellants respectively for paraplegia from waist down;
- (c) the refusal of the Sessions Court Judge to award post trial nursing care costs based on quotation from a nursing home;
- (d) pre-trial nursing care costs of RM600 per month for first appellant; and

- A (e) the refusal of the Sessions Court Judge to allow the appellants' claim for the renovation of their houses to facilitate the use of wheelchair.

**Paraplegia**

- B [4] The learned Sessions Court Judge awarded RM170,000 and RM180,000 respectively to the first and second appellants for the above injuries for paraplegia and loss of sexual function. Counsel for the appellants submitted that the award of RM170,000 and C RM180,000 for paraplegia is too low when compared to recent awards especially after considering the fact that no separate award was made for loss of sexual function. He cited the case of *Syarizan Sudirman & 2 Ors v. Abdul Rahman Bukit & Another* [2010] 2 PIR 51 where RM300,000 was awarded for paraplegia alone. In the above case the plaintiff was not injured due to a D motor vehicle accident as he was deliberately kicked off his motorcycle by a policeman. However, the awards for paraplegia in other cases are in the region of RM200,000 only. They are as follows:
- E (a) In *M Kumaresan Mumiandy v. Gan Yew Peng* [2011] 2 PIR 35, RM150,000 was awarded for paraplegia below the umbilicus.
- (b) In *Dass Darmalingam v. Mohd Fauzi Mohd Salleh & Another* [2009] 1 LNS 1581; [2011] 1 PIR 46, RM200,000 was F awarded. However, the plaintiff was permanently bedridden and needed full time nursing care. In the instant case, both appellants are able to move about in a wheel chair. The first appellant is even able to use a motorised tricycle.
- G (c) In *Zulsafari Ab Ghani & Anor v. Shahril Idris* [2002] 3 CLJ 187, RM190,800 was awarded for complete paraplegia.
- (d) In *Cheng Siak Hor & Anor v. Rozali Ahmad* [2002] 4 CLJ 223, RM150,000 was awarded for complete paraplegia.
- H (e) In *Mohd Amiruddin Kamurudin & Another v. Fazilah Abdul & Another* [2008] 1 PIR 35, RM160,000 was awarded for complete paraplegia below the waist.
- I [5] The Sessions Court Judge highlighted the case of *Mohd Amiruddin Kamurudin & Another v. Fazilah Abdul & Another (supra)* as a suitable comparable. As can be seen above, insofar as the award for paraplegia is concerned, the award of the Sessions

Court Judge cannot be said to be out of line with recent comparables. The only exceptions are the cases of *Izhar Ishak v. Cheah Per Nam & Anor* [2009] 1 PIR 26 and *Syarizan Sudirman & 2 Ors v. Abdul Rahman (supra)* where RM240,000 and RM300,000 was awarded. The case of *Syarizan Sudirman & 2 Ors v. Abdul Rahman (supra)* can be distinguished as it is not strictly a motor vehicle injury case. The injury resulted from the abuse of power by a policeman. It is more in the nature of an assault case. As for *Izhar Ishak v. Cheah Per Nam & Another (supra)*, the full judgment was not reported. From the synopsis of the award, the injuries appeared to be more severe as the plaintiff also suffered spondylolisthesis and posterior disc prolapse. The appeal court is generally disinclined to interfere with the award of the trial judge merely because the appeal court would have given a higher award (see *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22). In the above mentioned case, Abdul Hamid CJ as the Federal Court Judge stated the guiding principle for interfering with the assessment of the lower court awards as follows:

The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge.

[6] The time lapse between the case of *Mohd Amiruddin Kamurudin & Another v. Fazilah Abdul & Another (supra)* and the instant case is only about two to three years. The Sessions Court Judge increased his award by RM10,000 to RM20,000. Another trial court may have awarded RM200,000 instead of RM170,000 and RM180,00 but the relevant question to ask is whether in principle, the award is so inconsistent with recent trends that it can be considered as “wholly erroneous”. In my opinion, the award may not be characterised as generous but given the

- A relatively small margin of variance from the highest award for a similar injury, it cannot be said to be wholly erroneous. It must also be noted that the two appellants in the instant case are not bedridden and could move about in wheelchairs compared to some of the plaintiffs in the comparables cited by both counsel for appellants and counsel for the respondent. I shall therefore affirm the award of RM170,000 and RM180,000 for the paraplegia that afflicted the two unfortunate appellants.

### Loss Of Sexual Function

- C [7] As stated earlier, the learned Sessions Court Judge did not make a separate award for loss of sexual function. Counsel for the respondent submitted that it is not necessary to make an award for loss of sexual function because it was not stated in the medical reports. However, both appellants testified that they are D unable to have sexual intercourse. The medical report also stated that the first appellant suffered loss of all skin sensation below the waist. The learned Sessions Court Judge in his judgment assumed that the appellants suffered loss of sexual function. However, he E declined to make a separate award for loss of sexual function. He said that bladder incontinence and erectile dysfunction were interrelated with the waist down paralysis that the appellants suffered. He cited the case of *Thrimalai Palamiappan & Anor v. Mohd Masry Tukimin* [1986] 1 CLJ 347; [1986] CLJ (Rep) 756; [1987] 1 MLJ 153 where held Shankar J that:

- F Having reached the journey's end, I feel impelled to state once again that in cases of multiple injuries, it is not the correct approach to assess what each would be worth separately and then to insist upon payment of the global figure so arrived at. The end result of such an exercise is evident in the present case where G the global award claimed almost approached what a court would award to a paraplegic. Can we ignore the fact that notwithstanding the lacerations to various areas of the right leg, the leg itself is no longer there since it has been amputated? At the risk of repetition therefore I would state once again that where pain and H suffering, loss of amenities, and discomfort to a plaintiff result from multiple injuries it would be wrong to value each injury as though the others had not taken place and then to add all the figures together. (See *Phua Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 186, 188 and *Wieland v. Cyril Lord Carpets Ltd* [1969] I 3 All ER 1006).

[8] In the above case, the court made a global award for paraplegia instead of adding the individual components of injuries suffered by the plaintiff. However, it must be noted that the plaintiff did not suffer loss of sexual function in the above case. She was unable to have sexual intercourse in certain positions due to the vaginal injuries she suffered. She was not rendered incapable of conceiving either except that normal delivery was no longer possible and caesarean was required. In the instant case, the appellants have lost their sexual function in the prime of their life. In the premises, they should be compensated for this loss. Counsel for appellants submitted that RM80,000 should be awarded. However, in the authority cited by counsel for appellants, the plaintiff did not suffer paraplegia (see *Mohd Redzal Hasim v. Wong Kwai Chuen* [2008] 1 PIR 7). In the instant case, a reasonably large award had already been granted to the appellants for being rendered paraplegic. Counsel for the respondents had submitted in the lower court that if the trial court was minded to make an award for the loss of sexual function, RM30,000 is reasonable. I shall therefore award RM30,000 separately for each of the two appellants for the loss of sexual function.

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#### **Pre-Trial Nursing Care**

[9] For the pre-trial period of 44 months, the Sessions Court Judge allowed nursing care costs of RM600 per month for the first appellant. There is no complaint against the RM1,000 per month allowed for the second appellant. The first appellant's wife was working as a cleaner earning RM400 a month at that time. She had stopped working to look after the first appellant. Counsel for appellants submitted that this meant that the first appellant's wife received actual compensation of only RM200. There was no dispute that the first appellant's wife had given up her income of RM400 to look after him. Therefore the effort of the wife should be compensated on the same terms as that of a maid. I shall therefore accept the submission of counsel for the appellants and increase the award of pre-trial nursing care claim to RM800 per month. The nursing care award is therefore varied to RM35,200 (RM800 x 44 months).

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**A Future Nursing Care**

**[10]** The learned Sessions Court Judge calculated future nursing care for the first appellant at the rate of RM850 per month. Based on the Malaysian average life span of 75 years, he calculated the total costs of future nursing care as follows:

75 years – 26 (age at time of accident) = 49 years less 1/3 contingencies = 32.7 years as the multiplier.

RM850 x 12 x 32.7 = RM333,540.00 (less pre trial costs of nursing care).

**[11]** In respect of the second appellant, the Sessions Court Judge allowed nursing care at RM950 per month. He calculated total costs of future nursing care as follows:

75 years – 26 (age at time of accident) = 49 years less 1/3 contingencies = 32.7 years as the multiplier.

RM950 x 12 x 32.7 = RM372,780.00 (less pre trial costs of nursing care).

**[12]** The complaint of the appellants in respect of this award is as follows. During the trial, the appellants tendered evidence through a staff nurse of a private nursing home (Pusat Jagaan Damai) that the monthly fee, if they were admitted as in-house patients, would be RM6,950 each. The fee is inclusive of food, room charges and nursing care. Based on the decision in the case of *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174; [1990] 1 MLJ 99, counsel for the appellants submitted that the award for nursing care was justifiable and should not be any less than if the person concerned was looked after at home instead of in an institution. However, it must be noted that in the above case, only RM350 per month was awarded. In the instant case, the appellants are not bedridden though rendered paraplegic. They can still move around in a wheel chair. They are not totally helpless. During the four years between the accident and the judgment of the Sessions Court Judge, the appellants did not check into a nursing care home. The first appellant is even able to use a motorised tricycle. The learned Sessions Court Judge found that the nursing home was not necessary merely for the treatment of the bedsores of the second appellant. This situation is unlike other cases where the

plaintiffs were bedridden and required constant nursing care. The first appellant did not even say that he wanted to check himself into a nursing home. As for the second appellant, he appeared content with being looked after by his family although he did say that he may want to go to a nursing home in the future. When he was asked by his own counsel why he had not admitted himself into a nursing home and whether it is because of financial reasons, he replied that his family is still willing to look after him. Thus he did not say unequivocally that he would be checking into Pusat Jagaan Damai. For above reasons, I cannot say that the learned Sessions Court Judge was wrong in refusing to accept the quotation from Pusat Jagaan Damai as the basis for calculating future nursing care. However, I am of the opinion that the Sessions Court Judge erred in awarding only RM850 and RM950 per month respectively to the first and second appellants. The evidence from the appellants is that they still needed assistance to move about. The first appellant is currently assisted by his wife and the second appellant is being assisted by his mother and siblings. However, it is entirely possible that they may not be around in the future to continue looking after the appellants. Therefore, the appellants should be awarded compensation that is adequate to hire a maid to assist them for the rest of their natural lives. As submitted by counsel for the appellants, a monthly wage of RM850 or RM950 is too low to hire a domestic maid who would have to nurse and assist a paraplegic. In the Kuching case of *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127, Clement Skinner J (as he then was) endorsed the Lower Court award of RM1,500 as the monthly costs of hiring a maid to look after a paralysed plaintiff. In above mentioned case, the plaintiff was more seriously injured as he was paralysed but given the passage of time, I am of the view that RM1,500 or RM1,600 per month is a more realistic figure than RM850 or RM950 per month. I shall therefore award the first appellant RM1,500 per month as the costs of hiring a domestic maid. As for the second appellant, in view of the fact that he was more seriously injured, I shall award him RM1,600 per month as the costs of hiring a domestic maid. After deducting the pre-trial nursing care costs, I shall award RM553,400 and RM583,840 to the first and second appellants respectively.

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**A Renovation To Facilitate Wheelchair**

**[13]** The appellants testified that they renovated their houses which included the construction of ramps and enlarging the bathroom and toilets to accommodate the wheelchair. The first appellant pleaded for RM8,000 as his special damage in incurring the cost of renovation whereas the second appellant claimed RM10,000. The appellants called the contractors responsible for the renovation to the witness stand. The learned Sessions Court Judge however disallowed the expense of renovation for the sole reason that the receipts were not produced. He did not say whether he rejected the oral evidence of the appellants and that of the contractors. If he had done so, an appellate court should be slow to revisit his finding of facts. However, as the oral evidence was not addressed, with respect, I am of the view that he fell into error in failing to give sufficient appreciation to the same. The fact that the appellants had to renovate their house is plausible as the appellants are wheelchair-bound for life. As for the quantum, the evidence of appellants and their contractors should have been considered. The amount of RM8,000 and RM10,000 does not appear to be an astronomical sum. Therefore, unless the appellants or their contractors were demonstrably challenged and contradicted, the trial court should have allowed this claim. I shall, therefore, allow the claim of RM8,000 and RM10,000 to the first and second appellants respectively.

**[14]** In conclusion, the appeal is partially allowed and the quantum varied as stated above. The appellants shall have the costs of this appeal which I assess at RM5,000. Order accordingly.

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